BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDRES RANGEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,924
CARGILL MEAT SOLUTIONS CORPORATION	)	
formerly EXCEL CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the December 17, 2008, Review and Modification Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on April 7, 2009.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

This is the second review and modification proceeding claimant has presented. Accordingly, the stipulations and record listed in the initial Award rendered in this claim on May 26, 2004, along with the record listed in the first Review and Modification Decision rendered on February 11, 2008, and the record listed in the December 17, 2008, Review and Modification Decision comprise the record for this appeal.[1]

[1] In the December 17, 2008, Review and Modification Decision the Judge only listed the following as comprising the record: the Kansas Court of Appeals Memorandum Opinion filed October 21, 2005; the February 11, 2008, Review and Modification Decision; the September 17, 2008, Review and Modification Hearing transcript; the September 25, 2008 deposition of Michael H. Munhall, M.D.; the October 13, 2008, deposition of Dick Santner; the November 13, 2008, deposition of Pedro Murati, M.D.; the November 20, 2008, deposition of Terry Hunsberger, D.O.; the exhibits entered into evidence by the parties and the pleadings and correspondence contained in the administrative file. Although many of the earlier depositions and hearings are no longer relevant for purposes of this review and modification proceeding, they remain part of the record

ISSUES

As indicated above, this is the second review and modification proceeding presented by claimant in this claim for a series of accidents that allegedly occurred through June 8, 2000. A review of the procedural history is helpful.

In May 2004, claimant was awarded an 18 percent permanent partial general disability under K.S.A. 44-510e for bilateral shoulder and low back injuries. Claimant's permanent partial general disability was based upon the permanent functional impairment rating provided by a court-appointed medical examiner. The Judge denied claimant's request for a work disability[2] because respondent was willing to accommodate claimant's work restrictions but claimant refused after he decided he was unable to work even with accommodations.[3]

Claimant appealed the May 26, 2004, Award to the Board, which in its November 18, 2004, Order agreed claimant had not demonstrated a good faith effort to return to work and affirmed the finding that claimant's permanent partial disability was limited to his functional impairment rating. At oral argument before the Board on October 19, 2004, the parties had agreed that the 18 percent functional impairment rating found by the Judge should be affirmed.[4] Next, claimant appealed the Board's November 18, 2004, Order to the Kansas Court of Appeals, which affirmed the Board's findings that claimant failed to make a good faith effort to retain his employment with respondent and that claimant's permanent disability benefits should be limited to his functional impairment rating. What is more, the Court of Appeals stated:

> Excel offered reasonable accommodations to Rangel, who is now choosing not to work. Under such circumstances, a work disability award would be inappropriate. The Board correctly determined that Rangel is not so entitled.[5]

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in this claim.

[2] A permanent partial general disability under K.S.A. 44-510e greater than the functional impairment rating.

[3] ALJ Award (May 26, 2004) at 6.

[4] *Rangel v. Excel Corporation*, No. 258,924, 2004 WL 3089852 (Kan. WCAB Nov. 18, 2004).

[5] *Rangel v. Excel Corp.*, No. 93,656 (Kansas Court of Appeals unpublished opinion filed Oct. 21, 2005).

In short, the Court of Appeals affirmed the Board's November 18, 2004, Order. Thus, claimant was denied a work disability for his injuries and, instead, he was entitled to receive permanent partial disability benefits for his 18 percent whole person functional impairment.

On both November 17, 2004, and December 14, 2005, claimant filed an application to review and modify his award on the basis that he was allegedly terminated from his job with respondent "due to Respondent not having a position within his work restrictions."[6] It does not appear claimant pursued either of those applications. On August 20, 2007, claimant filed another application for review and modification because of the "diminished capacity of the claimant."[7]

On February 11, 2008, Judge Fuller entered a Review and Modification Decision in which the Judge denied claimant's request to modify the award of benefits for his 18 percent permanent partial general disability. The Judge held that none of the material facts or circumstances had changed; consequently, the Judge declined to modify claimant's award. In that proceeding, claimant alleged he was feeling worse and that his award should be modified because of the decisions entered in *Casco*[8] and *Boucher*.[9] Claimant did not appeal the February 11, 2008, decision.

Claimant filed his fourth request to modify his award on July 11, 2008. That application alleged that claimant had an "increased Impairment of capacity."[10] Judge Fuller then entered the December 17, 2008, Review and Modification Decision, which denied claimant's latest request for modification of his 18 percent permanent partial general disability. The Judge found that claimant had failed to prove that either his circumstances or disability had changed from when the claim was first litigated and decided in May 2004.

Claimant maintains Judge Fuller erred because he has developed an additional five percent impairment to his low back and his condition has worsened to the point he is now permanently and totally disabled from engaging in any substantial or gainful employment. At this juncture, claimant argues he has proven he is permanently and totally disabled

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[6] Application for Review and Modification, form K-WC E-5 (Rev. 7-00) (filed Nov. 17, 2004) and Application for Review and Modification, form K-WC E-5 (Rev. 7-00) (filed Dec. 14, 2005).

[7] Application for Review and Modification, form K-WC E-5 (Rev. 5-07) (filed Aug. 20, 2007).

[8] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[9] *Boucher v. Peerless Products, Inc.,* 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

[10] Application for Review and Modification, form K-WC E-5 (Rev. 5-07) (filed July 11, 2008).

regardless of the *Casco* decision.[11] Accordingly, claimant requests the Board to modify his award and grant him permanent total disability benefits under K.S.A. 44-510c.

Respondent argues the December 17, 2008, Review and Modification Decision should be affirmed. Respondent maintains that claimant's condition is essentially unchanged except for alleged increased subjective pain complaints.

The only issue before the Board on this appeal is whether claimant has sustained his burden of proving that his condition has changed since this claim was initially decided in May 2004 or since February 2008, when his first request to modify his award was denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds claimant has failed to prove his condition has changed to any significant degree since this claim was initially determined in May 2004 or since February 2008, when the Judge first declined to modify his award for an 18 percent whole person functional impairment.

The Workers Compensation Act provides that awards may be modified when an injured worker's condition or circumstances change.

> K.S.A. 44-528 permits modification of workers compensation awards in order to conform to changed conditions. This statute was intended to permit modification of awards when the condition of an injured employee either improves or worsens after the original hearing and award.[12]
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> There is no doubt, however, that the purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition. *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Hayes v. Garvey Drilling Co.*, 188 Kan. 179, 360 P.2d 889 (1961); *Williams v. Lozier-Broderick & Gordon*, 159 Kan. 266, 154 P.2d 126 (1944). These cases indicate that the statute represents legislative recognition of the difficulty in ascertaining the extent of a claimant's condition at the time of entering an award of compensation, so that at a future date it might become necessary to modify an

[11] Claimant's Reply Brief at 1 (filed Mar. 13, 2009). Cf. R.M.H. Trans. (Sept. 17, 2008) at 9.

[12] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

> original award upon a finding that the award was excessive or inadequate. The burden of establishing the changed conditions is on the party asserting them.[13]

Claimant contends his condition has worsened since he last worked for respondent in November 2002 and now he is unable to engage in any substantial and gainful employment. Consequently, claimant must prove that his condition has worsened or circumstances have changed since his initial award in May 2004 and since his first review and modification decision in February 2008.

According to the Board's November 2004 Order, the parties' agreed that claimant had sustained an 18 percent whole person functional impairment rating as found by the Judge. That rating was provided by the court-appointed medical examiner, Dr. Mark Williams. The findings at that time were that Dr. Williams determined in his June 2003 examination that claimant had mild herniated disks at L3-4 and L5-S1, mild internal impingement with hooking of the distal acromion in the left shoulder, and mild inflammation in the subacromial space in the right shoulder. Adopting Dr. Williams' opinions, the Judge rated claimant as having a 10 percent impairment to the whole person due to his low back; a six percent whole person impairment due to the right shoulder, and a three percent whole person impairment due to the left shoulder, all of which combined for an 18 percent whole person impairment as measured by the AMA *Guides*.[14]

The Board also found in November 2004 that respondent offered claimant accommodated work within his permanent work restrictions and that claimant failed to make a good faith effort to retain his employment with respondent and likewise failed to make a good faith effort to look for other employment. Accordingly, following the holdings of *Foulk*[15] and *Copeland*,[16] the Board imputed a post-injury wage to claimant, which was within 10 percent of his pre-injury wage. Consequently, claimant's permanent partial general disability under K.S.A. 44-510e was limited to his 18 percent whole person functional impairment rating. The Board held, in part:

> The Board has reviewed the record and concludes that claimant has failed to establish the good faith effort to retain his employment with respondent as required under *Foulk*. Respondent made every effort to place claimant in

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[13] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[14] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> accommodated positions following his return to work and continues to be willing to do so. On one hand claimant admits he is not looking for work, but then during the regular hearing he indicated he had looked for work at a few places, including a roofing company and at the local feed yards. The Board finds these efforts, even if true, to be far less than the good faith required under Kansas law. Thus, a wage must be imputed to him.[17]

Claimant argues he is entitled to a modification of his award under K.S.A. 44-528 because he is unable to work in any capacity. Accordingly, claimant contends he should receive an award for permanent total disability benefits. The Board disagrees.

The Board is not persuaded that claimant's condition has worsened or that there has been any significant change in his condition. First, claimant has maintained from the beginning that the injuries he sustained working for respondent have prevented him from working. When this claim was initially tried, claimant alleged that he was unable to perform even the accommodated work that respondent offered, which both the Judge and the Board found was within claimant's retained abilities. Indeed, claimant testified at the September 2008 review and modification hearing that he had been unable to do any work since November 2002, when he left respondent's employment.[18]

What is more, it is clear claimant's physical condition really has not changed in any significant manner from the time of his first review and modification hearing, which concluded with the Judge denying claimant's request for modification of his award. During the first review and modification hearing, which was held in December 2007, claimant testified his condition had worsened to the point that he could hardly drive, could only walk one-half of a block, was taking pain medication, had to alternate between sitting and standing, and had qualified to receive Social Security disability benefits. Claimant also testified about his unfruitful efforts to find another job. But despite that evidence, the Judge ruled in the February 11, 2008, Review and Modification Decision that none of the material facts regarding claimant's condition or circumstances had changed. That decision was not appealed.

The evidence claimant presented in his first review and modification proceeding is very similar to the evidence that he now presents. At his second review and modification hearing, which was held in September 2008, claimant again testified he could hardly drive, could walk only about one-half of a block, could not sit down or stand up, and that despite his efforts he was unable to find another job. Claimant initially testified he was looking for work and applying for jobs that he thought he could do, but later testified he could not

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[17] *Rangel v. Excel Corporation*, No. 258,924, 2004 WL 3089852 (Kan. WCAB Nov. 18, 2004).

[18] R.M.H. Trans. (Sept. 17, 2008) at 26, 27.

perform any of the jobs that he listed on an exhibit he produced at the hearing. What is more, claimant testified that some employers wanted to hire him but, rather than trying to work, he would explain to them he is hurt. Claimant testified, in part:

> Q. (Mr. Bangerter) Well, when you go to apply for a job, do you tell them I'm here to apply for a job but I don't think I can do it?
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> A. (Claimant) No, no, no, no. I go and I turn in an application. I go. I turn in my application and once that they see me, the way that I am, then they don't offer me -- they don't give you the job. And sometimes when they call me and they want to give me the job, I tell them that I am hurt from -- or injured from my foot and my waist and then they say, well, no, if you're like that, then we cannot give you a job.
>
> Q. So even when you're offered a job, you just tell them I can't do it?
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> A. No. I just tell them I'm injured. I'm injured.
>
> Q. Okay.
>
> A. And then they say that they are not going to give me any jobs.[19]

In short, claimant did not think he could work when the claim was initially decided, did not think he could work when the first review and modification proceeding was litigated, and presently does not believe he could work. Claimant acknowledged he had contacted potential employers only because *they* (his attorney) told him to.[20]

Likewise, the Board is not persuaded claimant's functional impairment has increased since either his initial award or his first review and modification proceeding. As indicated above, the parties agreed claimant sustained an 18 percent whole person functional impairment, which included a 10 percent whole person impairment for the low back, a six percent whole person impairment for the right shoulder, and a three percent whole person impairment for the left shoulder. Dr. Michael H. Munhall, who was hired by claimant's attorney and who is board-certified in physical medicine and rehabilitation, examined claimant in March 2006 and May 2008 and concluded claimant has a 15 percent whole person impairment for his low back under the AMA *Guides*.

> Q. (Mr. Sanchez) Now, on your rating to the back, you used table 72 of the guides; is that correct?

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[19] *Id.*, at 25.

[20] *Id.*, at 24, 25.

> A. (Dr. Munhall) Yes.
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> Q. And you came to a conclusion that -- I believe table 72 and DRE classification III, is that correct?
>
> A. Correct.
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> Q. But your rating of 15 percent is in between III and IV, is that correct?
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> A. DRE category II provides 5 percent for any [discrete] segment through the lumbar spine; therefore, you could apply 5 percent to any one or multiple levels through the lumbar spine. Now, previous examinations and testing have shown three [discrete] levels of injury through the lumbar spine for Mr. Rangel. He also has had preexisting left leg pain and new onset of progressive right leg pain. The difference between category II and III is 5 percent for any [discrete] radiculopathy on one or -- on one side. So I provided 5 percent for low back segmental injury, 5 percent for the right leg radiculopathy, 5 percent for the left leg radiculopathy yielding combined 15 percent.[21]

Dr. Munhall, however, only examined and evaluated claimant's low back; consequently, the doctor's rating does not purport to address whether claimant's combined 18 percent whole person functional impairment has changed (when considering the shoulders). More importantly, the record is unclear whether Dr. Munhall believes that claimant's impairment to his back has actually increased since the initial award or, instead, whether the doctor would have given claimant the same 15 percent whole person impairment rating had the doctor examined claimant when this claim was initially tried. It is clear, however, from Dr. Munhall's examinations that claimant's condition did not change to any significant degree between his 2006 and 2008 examinations. The objective findings from those examinations were the same. Only claimant's subjective pain complaints differed.[22]

On the other hand, Dr. Pedro A. Murati, who actually treated claimant, testified that claimant's condition has not changed since he initially evaluated claimant in both May and October 2002, when requested by claimant's attorney. After examining claimant in late October 2002, Dr. Murati concluded that claimant had lumbosacral strain with radiculopathy, right sacroiliac joint dysfunction, and bilateral rotator cuff strain, which the doctor rated as comprising a 17 percent whole person functional impairment under the AMA *Guides*. Moreover, the doctor concluded claimant was not a good candidate for surgery because of numerous Waddell signs. The doctor noted claimant had increased

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[21] Munhall Depo. at 10, 11.

[22] *Id.* at 18.

complaints at the October 2002 examination but the doctor concluded his functional impairment had not increased between the two examinations.

Dr. Murati most recently examined and evaluated claimant in October 2008 at respondent's request. This time the doctor found claimant had an additional Waddell sign. Based upon his three examinations of claimant, Dr. Murati found that claimant's condition had not changed between the 2002 and 2008 examinations. Likewise, the doctor concluded claimant's functional impairment and requisite work restrictions had not changed.[23] Dr. Murati testified claimant had a limp but he did not have an abnormal stance, unlike the abnormal stance claimant earlier displayed to Dr. Munhall.

Dr. Murati's opinions further support the Board's conclusion that claimant has failed to prove his condition or circumstances have changed to justify modifying his earlier award.

The Board acknowledges that claimant presented the testimony of vocational rehabilitation expert Dick Santner, who testified claimant was unemployable. But that is not a change in claimant's condition or circumstances as Mr. Santner found claimant unemployable when they met in January 2003 due to claimant's lack of job skills and education. Unfortunately, according to Mr. Santner, claimant does not speak English and he only has two years of formal education.

Lastly, the Board is compelled to comment on claimant's credibility. The Board is not convinced claimant is credible. The record indicates claimant exaggerates his complaints, symptoms, and disability. His testimony (and his clinical findings) portray inconsistency. His present job search is not designed to seek employment but, instead, is a sham executed to merely create evidence for this claim. Indeed, when offered employment, claimant then convinces the potential employer that it should not hire him. Unfortunately, claimant's statements and allegations cannot be accepted as true without careful consideration.

In conclusion, claimant's request to modify his award should be denied. Accordingly, the December 17, 2008, Review and Modification Decision should be affirmed.

AWARD

WHEREFORE, for the reasons expressed above, the Board affirms the December 17, 2008, Review and Modification Decision.

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[23] Murati Depo. (Nov. 13, 2008) at 12.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge